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In The

Supreme Court of the United States

MATTHEW J. RYAN, ROBERT C. JUBELIRER, JESS M. STAIRS and JAMES J. RHOADES,

Petitioners,

vs.

DAVID POWELL, *et al.*,

Respondents.

and

THOMAS RIDGE, Governor of the Commonwealth of Pennsylvania, *et al.*,

Petitioners,

v.

DAVID POWELL, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF AMICI CURIAE OF THE STATES OF ALABAMA, NEW JERSEY, NEVADA AND UTAH IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE

Amici Curiae State of Alabama and three other States submit this brief in support of Petitioners because they have been, and increasingly are being, made defendants in actions premised on the existence of an implied private right of action for disparate-impact claims under Title VI of the Civil Rights Act of 1964. As explained in greater detail below, such claims do not arise under the statute but, rather, under agency regulations. Only two Terms ago, this Court granted certiorari in *Seif v. Chester Residents Concerned for Quality Living*, No. 97-1620, to resolve whether Congress authorized such a private right of action. The *Chester Residents* parties suggested mootness, however, and certiorari was dismissed, forestalling a decision on this very important question. That dismissal of certiorari has not stopped the lawsuits against the States.

As the Ryan Petitioners note (Ryan Pet. 7), courts have issued decisions in cases that involve Title VI-based disparate-impact attacks on a wide variety of public policies. Among the recent such cases in which States were defendants are:

- The decision below, in which the plaintiffs alleged that Pennsylvania's system for funding public education had a disparate impact on racial minorities. *Powell v. Ridge*, Ryan Pet. App. 1a-34a. *See also Flores v. State of Arizona*, 48 F. Supp. 2d 937 (D. Ariz. 1999) (challenge to Arizona education funding system); *Cherokee Robinson v. Kansas*, No. 99-1193-JTM (D. Kan.) (pending challenge to Kansas' education funding system).

- A claim that the siting of a waste-water treatment facility had a disparate racial impact. *Chester Residents Concerned for Quality Living v. Seif*, 132 F.3d 925 (3d Cir. 1997), *vacated and remanded with instructions to dismiss as moot*, 119 S. Ct. 22 (1998);

- A claim that Alabama violates Title VI by administering drivers license tests only in English. *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (M.D. Ala. 1998), *app. pending*, No. 98-6598 (11th Cir.);

- A disparate-impact challenge to the siting of a state highway project. *Bryant v. New Jersey Dep't of Transportation*, 987 F. Supp. 343 (D.N.J. 1998), *vacated in part*, 998 F.2d 438 (D.N.J. 1998);

- A pending disparate-impact challenge to a State's high-school exit examination. *GI Forum v. Texas Education Agency*, Civil Action No. SA-97-CA-1278-EP (W.D. Tex. July 27, 1999).

- A challenge to California's Proposition 227, an initiative that replaced bilingual education programs with programs designed to teach students with limited English proficiency in the English language. *Valeria G. v. Wilson*, 12 F. Supp. 2d 1007 (N.D. Cal. 1998).

These cases show that the concern this Court expressed in *Washington v. Davis*, 426 U.S. 229, 248 (1976), that disparate impact claims would threaten "a whole range of tax, welfare, public service, regulatory, and licensing statutes," is not misplaced. *See also Hernandez v. New York*, 500 U.S. 352, 374 (1991) (O'Connor, J., with Scalia, J., concurring in the judgment) (quoting *Washington v. Davis*).

The Third Circuit's decision not only raises a host of practical difficulties for the States, it has important federalism implications. The decision – and similar ones by several other federal courts of appeal – is inconsistent with the contractual theory of Spending Clause grants announced by this Court and permits the abrogation of States' Eleventh Amendment immunity based on rights created solely through agency regulations. The States have an abiding interest in ensuring that, to the extent the federal government can impose liability and damages remedies upon States, this be done by Congress rather than by federal agencies.

Accordingly, the *amici* States respectfully submit this brief in support of the Petitioners. This Court should grant the petitions to address the issue it agreed to review in *Chester Residents* and should close a loophole that is being exploited to the States' detriment.

ARGUMENT

PRIVATE DISPARATE-IMPACT CLAIMS ARE NOT AUTHORIZED BY TITLE VI AND IMPOSE SERIOUS FEDERALISM COSTS UPON THE STATES

Petitioners present several questions that are of the first order of magnitude. This amicus brief will address only one of those questions: whether there is an implied private right of action to enforce the disparate-impact regulations promulgated under Title VI. That question is mooted, of course, if the Court holds (as Petitioners request) that those regulations are invalid. If, however,

the Court chooses not to address the validity of the regulations or expressly upholds them, the existence *vel non* of a private right of action for disparate-impact claims becomes critically important. As shown below, there is no basis upon which to hold that Congress intended to subject States to private disparate-impact actions pursuant to Title VI. Moreover, serious federalism problems are raised if federal agencies are permitted to impose new conditions on States in Spending Clause programs and subject States to private actions for conduct that Congress has not addressed.

A. Title VI Does Not Allow for the Implication of a Private Right of Action for Disparate-Impact Claims.

In *Cort v. Ash*, 422 U.S. 66, 78 (1975), the Court cited four factors relevant in determining whether an implied private right of action exists: (1) whether the statute creates a federal right in favor of the plaintiff; (2) whether there is any legislative intent to create or deny such a remedy; (3) whether it is consistent with the purposes of the legislative scheme to imply such a remedy; and (4) whether the cause of action is one traditionally relegated to state law. Underlying all of these considerations is the fundamental question of "whether Congress intended to create a private right of action." *Middlesex County Sewerage Auth. v. National Sea Clammers Assn.*, 453 U.S. 1, 13 (1981). *See also Suter v. Artist M*, 503 U.S. 347, 364 (1992); *California v. Sierra Club*, 451 U.S. 287, 293 (1981).

Guiding the inquiry into congressional intent are separation of powers concerns and the need to take the

express terms of congressional enactments seriously. Thus, in *Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 1996 (1998), the Court noted that the inquiry "inherently entails a degree of speculation," and endeavored to "ensure that we do not fashion the parameters of an implied right of action in a manner at odds with the statutory structure and purpose." Evaluation of the structure and purpose of Title VI demonstrate that it would be error for this Court to imply a cause of action under the disparate impact regulations.

This Court has consistently held that Title VI prohibits only intentional discrimination by recipients of federal financial assistance, *see Alexander v. Choate*, 469 U.S. 287, 293 (1985); *Regents of Univ. of Calif. v. Bakke*, 438 U.S. 265, 287, 328-40 (1978), and courts have held that there is an implied private right of action to enforce that bar on intentional discrimination. *See Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979). ("[W]e have no doubt that Congress . . . understood Title VI as authorizing an implied private cause of action for the prohibited discrimination.") The latter holding in no way resolves the question presented to this Court. It is one thing to find an implied private right of action to enforce a federal statute that prohibits unconstitutional conduct. *Cf. United States v. Fordice*, 505 U.S. 717, 732 n.7 (1992) ("[T]he reach of Title VI's protection extends no further than the Fourteenth Amendment.") It is a far different thing to find an implied private right of action to enforce agency regulations that vastly expand the liability imposed by the federal statute that authorizes their promulgation. *Cf.* 42 U.S.C. § 2000d-1 (Federal agencies are authorized and

directed to "effectuate the provisions of section 2000d . . . by regulation").

Agency regulations that prohibit disparate impact go beyond what Congress prohibited. While Congress prohibited only unconstitutional intentional discrimination in Title VI, the agency regulations bar conduct that is not unconstitutional. Evidence of disparate impact alone does not establish a constitutional violation. *See, e.g., Washington v. Davis*, 426 U.S. 229, 246 (1976). In addition, different states of mind are involved in that intentional discrimination requires a showing of discriminatory purpose, something that disparate impact does not. *See, e.g., Massachusetts v. Feeney*, 42 U.S. 256, 279 (1979) (" 'Discriminatory purpose' implies more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker . . . selected . . . a particular course of action at least in part 'because of' not merely 'in spite of' its adverse effects upon an identifiable group.")

Simply put, if Congress expressed no intent as to disparate-impact claims, there is no basis upon which to find that Congress intended to allow a private right of action to enforce disparate impact claims. The fundamental difference between intentional discrimination, which is all that Congress prohibited, and disparate impact supports this conclusion.

This fairly obvious conclusion is further buttressed by the structure of Title VI. Section 602 of the Civil Rights Act of 1964 – under which the disparate-impact regulations were promulgated – establishes a comprehensive agency enforcement system. Agencies may enforce compliance with their regulations by "terminat[ing]" or

"refus[ing] to grant or continue . . . assistance" or by any other lawful means. 42 U.S.C. § 2000d-1. Termination of funding must follow an opportunity for hearing and notice to Congress, and does not become effective until thirty days after notice to Congress. *Id.* The creation of an agency remedy and the absence of any mention of a private right are powerful indications of Congress's intent. *See Gebser*, 118 S. Ct. at 1999 (presence of an express administrative remedy that includes notice to Title IX grantees makes it "unsound" to imply a judicial remedy based on absence of actual notice).

There are important structural differences between the agency remedies specified in Section 602 and private rights of action. Those private actions are not subject to the restraint imposed by Congressional oversight. When federal agencies are required to provide notice to Congress and wait for 30 days before acting, those agencies must make certain that any conditions they wish to impose on a recipient of federal funds conform to Congress's understanding of the law. In contrast, private plaintiffs are free to attempt to reengineer State policies without any such check. Congress, however, specified agency notice, but said nothing about private actions.

Implying a private right of action for disparate-impact claims also is inconsistent with the contractual nature of Title VI. This Court has explained that:

> The legitimacy of Congress' power to legislate under the spending power thus rests on whether the State voluntarily and knowingly accepts the terms of the "contract." There can, of course, be no knowing acceptance if a State is

> unaware of the conditions or is unable to ascertain what is expected of it. Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously. By insisting that Congress speak with a clear voice, we enable the States to exercise their choice knowingly, cognizant of the consequences of their participation.

Pennhurst State School v. Halderman, 451 U.S. 1, 17 (1981) (internal citations and footnote omitted). More recently, in *Gebser*, this Court observed that the contractual theory of grants has "implications for our construction of the scope of available remedies." 118 S. Ct. at 1998. Among other things, funds are given to recipients for specific purposes. The obligations imposed as the result of private actions divert funds from those specified purposes, and the related costs may exceed the funding provided. *See Gebser*, 119 S. Ct. at 1999.

Congress most certainly has not spoken "with a clear voice" regarding disparate-impact claims and, more specifically, private rights of action to enforce such claims. To the contrary, this Court has concluded that Congress did not speak to disparate-impact claims at all. *See* cases cited *supra* at 5. If the test is what Congress envisioned the States' liability to private parties would be, once again the result is clear: there is no basis upon which to conclude that Congress "envisioned" States being subjected to private actions asserting that State programs have a disparate impact.

Likewise, this Court has neither expressly nor impliedly held that there is an implied private right of action

under the disparate-impact regulations. In particular, neither *Guardians Assn. v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983), nor *Alexander v. Choate*, 469 U.S. 287 (1985), supports the implication of a private right of action to enforce the regulations. In *Guardians*, this Court affirmed the denial of compensatory relief to plaintiffs in a Title VI lawsuit, reaching two conclusions as it did so. First, seven members of the Court agreed that proof of discriminatory intent is required to establish a violation of Title VI. 463 U.S. at 607 n.1 (Opinion of Powell, J.). Second, five members of the Court joined "to form a majority for upholding the *validity* of the regulations incorporating a disparate impact standard." *Id.* at 607 n.27 (Opinion of White, J.) (emphasis added); *see also id.* at 584 n.2. In *Alexander*, the Court confirmed this reading of *Guardians*. 469 U.S. at 292-93. Any uncertainty has been dispelled by *Fordice*, in which the Court rejected an attempt by private petitioners to assert a claim regarding affirmative action required by Title VI regulations, noting, "Our cases make clear . . . that the reach of Title VI's protection extends no further than the Fourteenth Amendment." *Id.*, 505 U.S. at 732 n.7.

B. Implying Private Disparate-Impact Claims Against States Creates a Host of Federalism Problems

The Spending Clause remains a significant loophole to the rule that the federal government "may not compel the States to enact or administer a federal regulatory program." *Printz v. United States*, 521 U.S. 898, 935 (1997). For this reason, it is critical that Spending Clause contracts between the federal government and States be

interpreted according to the plain terms of those contracts. Under the approach taken by the Third Circuit and many other courts of appeal, however, those contracts can be rewritten after-the-fact by federal agencies. That is a terribly one-sided means of interpreting a contract.

Moreover, private actions are not even subject to the constraints that limit the actions of federal agencies. As noted, when a federal agency wishes to sanction a State for administering a Spending Clause program in a manner that has a disparate impact, the agency must account to the committees of the House and Senate with legislative jurisdiction. That requirement restrains federal agencies because it makes them show that any sanctions they wish to impose on a grantee are consistent with Congress's understanding of the law. Any agency funding actions are limited, however, by both process and political checks. By contrast, private plaintiffs are unburdened by that scheme and by the give-and-take of the political process. Plaintiffs who disagree with politically adopted state policies have, increasingly, used these generally-worded disparate-impact regulations to trump political decisions.

The lawsuits themselves tell the tale. In *Chester Residents* and *Bryant*, the plaintiffs sought to use the courts to block construction of a waste-water treatment facility and a highway, respectively. Those facilities cannot be placed in any location, and the process of siting them generates NIMBY ("Not in my back yard") fights. The plaintiffs in *Chester Residents* and *Bryant* lost their NIMBY battles, but took a second bite at the apple with their Title VI lawsuits. These lawsuits thus stall or divert needed projects to the detriment of the State's waterways when a waste-

water treatment facility is delayed and the general driving public when the highway project is stalled.

The education lawsuits are similar attempts to use the federal courts to dictate state policy. *Powell* and *Cherokee Robinson* involve challenges to state school funding systems. The Ridge and Ryan Petitioners show that the Pennsylvania system is statutory and includes a state subsidy that includes consideration of the number of children in low-income families residing in the district. *See, e.g.*, Ryan Pet. 3. The Ryan Petitioners point out, "Philadelphia . . . has 12 percent of the Commonwealth's public school children yet receives about 18 percent of the total state subsidy for basic education. . . . If the subsidy were given on a flat, per-student basis, Philadelphia would obviously get less." *Id.*, at 3 n.6. Systems like Pennsylvania's that distribute federal, state, and local funds according to a statutory formula are not the result of intentional discrimination. Rather, they are the inherently political products of the interaction between the state executive and legislative branches.

Such uses of the federal courts not only frustrate the political process but also threaten interests protected by the Eleventh Amendment. It is axiomatic under Eleventh Amendment jurisprudence that *Congress* is the entity that can abrogate the States' immunity. Congress has done that for intentional discrimination and only for intentional discrimination. The Third Circuit's ruling approves of *federal agencies* abrogating the States' sovereign immunity from private actions alleging disparate-impact claims. This is a significant leap, and one that is flatly inconsistent with a host of decisions by this Court that require Congress to speak in unmistakably clear language

before a statute will be interpreted to abrogate the States' immunity. *See, e.g., Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 55 (1996) ("Congress' intent to abrogate the States' immunity from suit must be obvious from a clear legislative statement.") (internal quotation omitted); *Gregory v. Ashcroft*, 501 U.S. 452 (1991) (Setting forth a "clear statement" rule in the Tenth Amendment context); *Atascadero State Hospital v. Scanlon*, 473 U.S. 224 (1985) (Clear and unambiguous abrogation of immunity required in Eleventh Amendment context).

CONCLUSION

For the reasons stated in the Ridge and Ryan Petitions and in this amicus brief, this Court should grant the writ of certiorari and, on review, reverse the decision of the Third Circuit Court of Appeals.

Respectfully Submitted,

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